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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication.

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Authors may be requested to submit a hard copy of their manuscript, in addition to a digital copy, together with a summary of the contents. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All notes should be numbered in sequential order, as cited in the text, *Except for the first note, giving the author's affiliation. The author should submit biographical data, including his or her current affiliation.

Katja Michel, *Institutionelles Gleichgewicht und EU-Agenturen. Eine Analyse unter besonderer Berücksichtigung der European Banking*. Berlin: Duncker & Humblot, 2014. 324 pages. ISBN 978-3-428-14467-9. EUR 90.

This book is the published version of the author's doctoral thesis, and aims to explore the exigencies flowing from the institutional balance for the process of EU agencification. For this it takes the European Banking Authority (EBA) as a case study, rather than focusing on all the

different EU agencies. Since the EBA is one of the most powerful agencies so far established, this choice can only be supported.

However, the institutional balance is a rather elusive concept in EU constitutional law and its relation with the general principle of separation of powers is generally ill-understood. This book contributes to the debate by correctly distinguishing the two, finding that the EU conforms to the principle of separation of powers, albeit atypically (pp. 56–57). As Michel notes, the EU, perhaps more than nation States, is characterized by a significant number of checks and balances (pp. 62–63). Next to this is the institutional balance – on which Michel notes that it may indeed be a genuine principle of EU law. However, this part of the book would have merited further elaboration. Michel forcefully rejects the idea that institutional balance would require the institutions to have equal powers (which in German emphasizes the *Gleich* in *Gleichgewicht*) or that the many Treaty revisions of the past decades would somehow rule out the existence of an institutional balance, but it is not completely clear how Michel then conceives the institutional balance. If it has an independent meaning (*einen eigenständigen Bedeutungsgehalt*, p. 69), why have recourse to the principle of separation of powers to make sense of it (pp. 67–68)? Is the institutional balance not simply a product of the Treaties, and if so why would one and how could one look outside the Treaties to identify an (abstract) institutional balance? This issue is emphasized, but not addressed, when Michel notes that the institutional balance should also be taken into account when the Treaties are revised (p. 91). How can this be done when in *Chernobyl* the Court stated that the institutional balance is created by the Treaties?

The Court's case law in which it relied on the institutional balance is then presented but the selection of cases is not completely clear. In the *Romano* and *Titanium dioxide* cases, for instance (pp. 76–78), the Court did not rely on the institutional balance even if it may be argued that institutional balance problems were at issue. Secondly, while the change in terminology (from “balance of powers” to “institutional balance”) since *Meroni* is noted (p. 74), Michel does not mention how also a change in function has occurred, where the Court in *Vreugdenhil* and *British Steel* denied any protective function to the institutional balance, unlike in *Meroni*. Michel concludes that the institutional balance's purpose is to protect the prerogatives (or the tasks and competences) of the institutions (p. 84). This is similar to its purpose as identified by Le Bot in his doctoral thesis on the institutional balance, who nonetheless emphasizes more the objective of protecting the EU's institutional system (rather than the institutions themselves). Still Michel later seems to depart from her view when she relies on the *Fiorucci* case before the GC to argue that the institutional balance protects the agencies as well (p. 113), instead of simply rejecting this broadening based on the identified purpose of the institutional balance. Such nuances should indeed invite a more profound scholarly debate on the institutional balance, to which Michel further contributes by identifying four possible functions of the institutional balance (pp. 86–90): (i) representation of and compromise between interests, (ii) avoiding abuse of power and securing freedom, (iii) securing effectiveness and efficiency of the EU and (iv) securing democratic legitimacy.

Following this necessary exploration of the purpose and function of the institutional balance, the book moves on to its key question: how do EU agencies affect the institutional balance and how may the latter set limits to the process of agencification? To answer this question Michel notes that the nature and scope of powers granted to the agencies play a key role, relying on the normative classification of EU agencies already worked out by Griller and Orator (pp. 105–106). But as Michel further hints (pp. 110–111), the requirements flowing from the institutional balance also depend on other factors. While the latter are not really further elaborated by Michel, one could think of the policy field and the stage in the policy cycle: imagine for instance the establishment of an agency identical to the EBA but in the field of competition law. This would be much more questionable compared to establishing the EBA, even if both agencies would have identical powers.

Michel then cogently sets out the different tensions which go with agencification, although no clear distinction is made between assessing agencification under a principle of separation of powers and under the institutional balance. The danger of creating a fourth branch (p. 108)

relates to the former, the danger of Parliament and Council undermining the Commission's position (p. 108) to the latter. The danger related to the vertical order of competences then seems to relate more to the principle of conferred powers: by establishing EU agencies, the rule that Member States are responsible for implementing EU law (Art. 291(1) TFEU) may be subverted. On the other hand the Member States are the dominant players in the Boards of the agencies which may mean that EU agencies are vehicles for Member State-control (pp. 108–109). Again the legal issues could have been distinguished more neatly when the EU's competence to establish subsidiary bodies is discussed. The relevance of the institutional balance to this question is not completely clear, since it seems to fall under the principle of conferred powers (as is later also argued at p. 117). Still Michel correctly concludes that Article 13(1) TEU does not contain an exhaustive list of EU bodies, even if it is doubtful that the references to “bodies, offices and agencies” throughout the Treaties indeed *anchors* the agencies in the Treaties as Michel claims (p. 112). As she further notes, the Court in the *ENISA* case did not refer to the institutional balance and neither was the principle relied on in the *Short-selling* case. However Michel may have jumped to conclusions by inferring from such omissions that the institutional balance is not being violated (p. 113). After all, this could also be proof of the Court's step-motherly treatment of the “principle” of institutional balance, also recently lamented by A.G. Bot in the *Artegoda* case.

One of the most important issues relating to agencification is how EU agencies may be granted executive powers which *prima facie* come under the powers reserved to the Commission (and Council) under Articles 290 and 291 TFEU. The book only deals succinctly with this issue in general (pp. 114–116) and concludes that such executive powers may indeed be granted to EU agencies. As regards powers (similar to those) under Article 290 TFEU, Michel seems to make a distinction between (non-delegable) materially legislative powers and the (delegable) power to adopt normative acts, without making clear where the difference between the two would lie.

While the institutional balance's general status as a principle of EU law is unclear, the EU legal order does have the principles of conferred powers, subsidiarity and proportionality and Michel rightly relies on them to further assess agencification. She does so concisely (pp. 116–124), showing how also these issues merit further scholarly attention. The second fundamental issue, and the one which has been debated most intensively, relates to the extent of the powers that can be delegated to or conferred on agencies. Which one of the two is at issue when agencies are empowered is touched upon (p. 125), but not elaborated. In the literature, the empowerment-question has most often been addressed through the lens of the *Meroni* case law, with Michel correctly noting that many different interpretations of this jurisprudence had been advanced before the Court in *Short-selling* confirmed that (a revised) *Meroni* indeed applies to the EU agencies (p. 126). Rightly Michel does not rely exclusively on the new *Short-selling* doctrine to identify those powers which are (non-)delegable to EU agencies (pp. 124–138) and even explores whether agencies may be empowered to adopt the acts referred to in Article 288 TFEU (pp. 139–143). Exploring the independence or the autonomy of EU agencies, Michel makes some bold propositions, even linking the ECJ's case law on the independence of national data supervisors with the EU agencies' independence, and reading Article 298 TFEU as a provision shielding the EU agencies from interference from the Commission (pp. 149–150). Generally, the sections on control by Commission, Parliament and the Court (pp. 148–157) remain descriptive, whereby only the control over the EBA is evaluated in the second part.

The second part of the book concentrates specifically on the EBA, situating this agency in the broader regulatory framework (pp. 168–200) and presenting its internal functioning (pp. 207–218). The case study illustrates some of the general propositions made in the first part: a pragmatic view is taken on agencification but the emphasis is rightly placed on the issue of controlling the EBA, where the lack of voting rights for the Commission in the EBA Board of Supervisors is repudiated (pp. 221–226), and on the (legislature's) duty to properly argue why recourse to an EBA is necessary when the Treaties identify the Commission as the default executive authority at EU level (p. 227). As regards the EBA's involvement in the adoption (by the Commission) of delegated and implementing acts, a hotly debated issue during the

legislative process establishing the ESAs, Michel stresses that the Commission only has a monopoly on the adoption of these acts and not on their drafting. The EBA may thus be involved, but the limited possibilities for the Commission to change an EBA draft delegated act is found to contravene the institutional balance (pp. 227–236). Particularly interesting is also the assessment of the EBA's powers following the realization of the Banking Union. Michel finds it unacceptable that the ECB, an institution, as competent authority for the Eurozone might be subordinate to the EBA, an agency (pp. 249–253). Still this also raises the question where the ECB should be situated in the institutional balance as an atypical (i.e. apolitical) institution, something which is not completely clarified (compare e.g. p. 32 and p. 58). From this perspective it is a pity that Michel does not comment on the legislature's choice to entrust the ECB with supervisory tasks in the Banking Union rather than establishing a new agency or searching for a solution within the EBA. Was recourse to the ECB actually necessary, in light of the ECJ's subsequent relaxing of *Meroni* in *Short-selling*? The limited role of the Commission in the procedure whereby the Council declares the existence of an emergency situation (see Art. 18 of the EBA Regulation) is further found to violate the institutional balance and it is suggested that the EBA's powers in those situations are not precisely delineated as required by *Short-selling* (pp. 253–255). The second part concludes with an insightful evaluation of the legal remedies available against the EBA's acts (pp. 269–281).

The many comments in this book review should not reflect negatively on the merits of the book, but instead show that EU agencification for a large part remains uncharted territory and that further academic debate is needed. The book under review very much contributes to that debate and is an interesting read for academics and practitioners dealing with the institutional balance, EU agencies generally or the regulation of the banking sector specifically. The book is written in accessible German and anyone interested in EU agencification will appreciate its German, but not excessively strict, perspective.

Merijn Chamon
Gent

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